IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 673 OF 2003
WITH
CIVIL APPLICATION NO. 988 OF 2003

1. Sou. Shakuntala Babasaheb
Patil and anr. ..Appellants

Vs.

1. Sou. Ratnaprabha Babasaheb
Shirote and anr. ..Respondents

Mr. T.S. Ingale for appellants.
Mr. A.J. Chougule for respondent no.1.

CORAM: B.H. MARLAPALLE, J.

Date : April 30, 2007.

P.C.:

1. Heard Mr. Ingale the learned counsel for the appellants who were defendant nos.1 and 2 in RCS No. 51 of 1989. The present respondent no.1 along with her husband Babasaheb had filed the said suit and impleaded the present respondent no.2 as defendant no.3. The suit was for partition and separate possession of the suit properties which are mentioned below:-

	Gat No.	Area Hector R.	Amount	
(A)	1712	2 - 05	24-06	
(B)	1713	0 - 17	1-81	(Well)

(C) The suit house bearing G.P. No. 256 in Ward No. 1 situated at village Dudhagaon, which is worth Rs.7,200/-.

(D) Suit house bearing G.P. No. 225 is the open plot and it's worth is Rs.1500/- and at present said property changed into C.T.S.No. 657, 659, 661, 663 and 664 including the right to joint and common enjoyment of house C.T.S. No.664 alongwith all necessary rights.

(E) A motor car of Gazal Company bearing No.1 MTK-8158 of Model of 1974 of which worth comes to Rs.30,000/- and which is in the name of deceased Balasaheb Kole.

(F) The amount of Rs.18,750/- which is in current Account No. 27 in Ashta People's Co-Operative Bank Ltd., Ashta, which was in the bank till 27/6/1983 and in which plff. has her 1/3rd share.

2. It was contended that Balasaheb Dudhappa Kole was the father of the plaintiff, defendant no.1 and defendant no.3 and was married to Indumati. Balasaheb and Indumati did not have son and Indumati died on 18/1/1972, whereas Balasaheb died on 13/4/1987 but without effecting any partition of the suit properties held by them and, therefore, plaintiff claimed her

1/3rd share in the suit properties. The defendant no.2 is the husband of defendant no.1 and both of them opposed the suit on three grounds, namely, there was a partition effected by Balasheb before his demise and plaintiff no.1 was given 17 tolas of gold and Rs.4000/-, whereas defendant no.3 was given a cash amount of Rs.30,000/-. Car bearing Registration No. MTK - 8158 was handed over by Balasaheb to his sister's son Dr. Surendra Desai without any consideration and remaining suit properties were handed over to defendant no.1 who had looked after Balasaheb during his last days. It was claimed that Balasaheb was staying with defendant nos.1 and 2 for about two years prior to his demise. The second ground taken was based on the relinquishment deed dated 20/7/1987 (Exh.110) and it was contended that by the said deed the plaintiff no.1 and defendant no.3 had relinquished their share in favour of the defendant nos.1 and 2. Thirdly it was contended that Balasaheb had executed a Will dated 6/4/1987 (Exh.113) in favour of defendant nos.1 and 2. Defendant No.2 also happened to be Balasaheb's sister's son. Both the courts below have rejected the claim of defendant

nos.1 and 2 on all the grounds.

3. First, there was no proof, except the oral statement of defendant no.2 in the witness box that his father-in-law and maternal uncle Balasaheb had given 17 tolas gold, Rs.4000/- cash to plaintiff no.1 and an amount of Rs.30,000/- to defendant no.3 and thus the partition was effected by handing over the remaining suit properties to defendant nos.1 and 2. No error could be attributed to this finding in as much as alleged partition made by Balasaheb was not proved. The second ground of relinquishment deed at Exh.110, the courts have observed that it was not registered and secondly, after the demise of Balasaheb, on 27/7/1987 defendant no.1 got the sale deed executed from defendant no.3 in respect of her 1/3rd share in the suit properties and, therefore, there was no reason to believe that such a relinquishment deed was executed. In addition, the courts below have referred to Section 17-B as well as Section 49 of the Indian Registration Act. Section 17 states that the document shall be registered if the property to which it relates is situated in a District

and Section 49 lays down the effects of non registration of such document. Section 49 of the Indian Registration Act reads as under:-

> "No document required by Section 17 or any provision of the Transfer of Property Act, 1882 to be registered shall,
>
> a) affect any immoveable property comprised therein or;
>
> b) confer any power to adopt, or;
>
> c) be received as evidence of any transaction affection such property or conferring such power.
>
> unless it has been registered.

4. Coming to the last aspect of the so called Will at Exh. 113, the defendants had examined the scribe of the Will and one Baban in support of the Will. The Will was not registered and in addition it claimed to have only one witness who was examined before the court and this witness also was not the resident of Balasaheb's village. The courts noted that Balasaheb was the Sirpanch of his village and there was no reason why he would have a witness on his Will from some other village. The courts also noted the contentions of the plaintiff that Balasaheb was

not well for the last about two years before his demise. He was not in a mentally fit condition to make any Will and the Will at Exh.113 was not certified by any doctor regarding the mental condition of Balasaheb. Even otherwise, the Will did not meet the requirements of Section 63(c) of the Indian Succession Act which reads as under:-

> "Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged or amariner at sea, shall execute his will according to the following rules-
>
> The will shall be attested by two or more witnesses, each of whom has been the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark or of the signature of such other person and each of the witnesses shall sign the will in the presence of the testator but it shall not necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

5. Both the courts below have concurrently held against the defendant nos.1 and 2 and when the relationship between the plaintiff, defendant no.1 and

defendant no.3 is not disputed, they were entitled for 1/3rd share each in the suit properties held by Balasaheb, their father. All the grounds on which the defendant nos.1 and 2 tried to defeat the claim of the plaintiff have been discarded by both the courts below and defendant no.3 has supported the case of the plaintiff. No substantial question of law, therefore, arises for consideration in this second appeal arising from the concurrent decrees passed by both the courts below.

6. Hence the appal is dismissed.

7. Civil Application No. 988 of 2003 does not survive and the same shall stand disposed as such.

(B.H. Marlapalle,J.)